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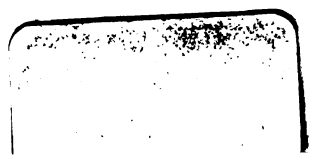

# COMMERCE & PROPERTY

IN

# NAVAL WARFARE

## A LETTER OF
## THE LORD CHANCELLOR
## [Loreburn]

*EDITED, WITH INTRODUCTION, NOTES & APPENDICES*

BY

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# PREFACE.

To reform the international laws and customs of warfare at sea is the ambition of all far-sighted men who have at heart the commercial and maritime interests of the world. The volume and complexity of trade have grown so enormously even during the brief period of 50 years that has elapsed since neutrals by the Declaration of Paris gained their Magna Charta; the balance of juristic and commercial opinion has been so greatly altered since the Abbé de Mably, Franklin, Galiani, and Brougham preached to unenlightened governments; finally, the approach of the second Hague Conference, when this question must come up, is so near that a brief statement of the case as it now stands seems to be required. Accordingly, I have ventured to ask the present Lord Chancellor for his permission to republish a letter addressed to the *Times* by Sir Robert Reid last autumn. No modern writer has shown so clearly, so broadly, and so concisely, the overwhelming strength of the arguments which should make our own country the protagonist in the movement. The letter is reproduced as it appeared in the

*Times*, save for one or two minor alterations which Lord Loreburn thought should be made for the sake of accuracy. For the notes and introduction I am wholly responsible. In the appendices will be found some illustrations and a bibliography.

F. W. H.

New Court, Temple,
*October*, 1906.

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# INTRODUCTION.

As the time of the second Hague Conference draws nearer the problems that call for solution take shape, and we begin wondering, and perhaps planning, how to scale the difficulties that bar the path of international progress. Questions of reducing armaments by an international convention, of establishing an international council, of extending the sphere of the Hague Tribunal, and of improving the laws and customs of peace and war, will all demand an answer. And much will depend on the form in which they are put, and the arguments by which they are backed. Every government will have to make up its mind in a short time, and it will rightly expect to be assisted in that process by the operation of public opinion. As the best government seldom makes an international right or international advantage the aim and standard of its policy, it follows that writers and speakers who discuss such reforms as these will be well advised if they rest their arguments mainly upon national interests, including in that term security as well as prosperity, defence as well as opulence—remembering, however, that the ever increasing dependence of defence upon opulence is apt to be underrated, if not wholly forgotten.

Of all the projected reforms of international law the most pressing and important undoubtedly is an extension of the Declaration of Paris, so that private citizens of the nations which are at war, as well as of neutrals, shall be free to engage in peaceful commerce. This would practically abolish prize money at sea just as booty or loot has been abolished in wars by land. If, for example, Norway should unfortunately go to war with Turkey, a Norwegian, under the proposed new rule, would have as much right to carry flour in a ship as he now has to carry flour in a waggon, and the Turk would have no more right to make prize of the ship than he now has to loot the waggon. Since the time of Cobden a question so vital to commerce as this has been perhaps too exclusively resigned to jurists and "naval experts." Happily English as well as continental jurists are now predominantly in favour of the exemption of all private property (not contraband of war) from capture at sea. As for the naval experts it is a mere coincidence that three or four journalists of a particular type should have engrossed that title, and their opposition has no significance unless it is based upon sound and intelligible arguments. Plenty of naval men realize that prize money is an anomaly, and that the destruction of merchant shipping could not be tolerated much longer, even if it were not already frustrated by the practice of insurance.

Without forgetting the history of the subject, or its doctrines and legal refinements, our preoccupation as advocates of this reform should be to show, in the simplest and plainest language, that it is certain

to advance the true interests of Great Britain. That it is also in their true interests foreign nations will, we may hope, see for themselves. What is good for one country is generally good for another, although the old fallacy still persists that what benefits Germany (for example) must injure us, and *vice versa*. As a matter of fact no two countries, not even England and France, profit more from mutual trade and reciprocal prosperity. Nor should it be needful to enlarge upon the train of blessings which this reform will draw after it for humanity. What is proved to be in the long run for the benefit of each may be concluded to be for the benefit of all. The public will not embrace a change, or rather a development of policy, merely because jurisprudence and philanthropy support it. But if it be clear, as the Lord Chancellor's letter shows, that the trade and security of Great Britain call imperatively for this reform, we may fairly hope that national conservatism will not stand in the way.

The letter itself with the notes and appendices should suffice to enable everyone who is at all conversant with the conditions of modern commerce to form an independent judgment. But just a few additional remarks may be subjoined.

By joining in the Declaration of Paris, Great Britain abandoned the claim so often asserted by her governments and defended by her jurists to seizing enemy's goods on neutral vessels. Those who regarded the matter solely from the standpoint of the injury which our navy might inflict on an enemy's commerce held that we had relinquished our most valuable instrument of offence; and for some years a constant agitation

was kept up by a society of naval strategists for the denunciation of the Declaration. In 1875, on one of the last occasions when our government was urged to withdraw from the Declaration, Sir William Harcourt recalled a remarkable saying of Lord Clarendon's "that this Declaration would have been made in Paris whether England had joined in it or not; the determination of all the powers of Europe was so pronounced and unanimous that in that great conference —which was in some sense a readjustment of Europe —that Declaration would inevitably have been made." This fact should be impressed at the present time upon the minds of those who would prevent Great Britain from joining cordially in the further proposals for assimilating the laws of warfare by sea to the laws of warfare by land.

Happily from the purely national standpoint of its influence on our sea power, the second step is much less disputable than the first. Thus Mill, who curiously enough (p. 39) took up an attitude of strong antagonism to the Declaration, came afterwards to the opinion that if we cannot go back it is much to the interest of Great Britain to carry the policy of 1856 to its logical conclusion and to exempt all non-contraband property from capture at sea. Nevertheless it is quite possible that the same school of naval and military writers, who so bitterly objected to the Declaration of Paris, will again endeavour to postpone a reform which is already seen to be inevitable. It will not be the first time that professional spirit has blinded able and honest men to the real interests of their own country. Statesmen must be patient but firm. They have an enviable opportunity of conferring a blessing of the

first order alike upon the citizens of Britain and the citizens of the world, and it would be a sad reproach if Great Britain were to follow grudgingly and of necessity where she ought to act spontaneously as leader of the nations.

Hitherto British governments have been slow to admit the necessity of progressive reforms in the conduct of naval warfare. France has also hesitated. But Germany, since the time of Frederic the Great, has steadily favoured the principle of exempting all private property that is not contraband of war from capture at sea. Indeed the principle was adopted and carried out in the war of 1866 by Prussia, Italy, and Austria, the three Powers concerned. A practically unanimous resolution in favour of the proposal was carried by the North German Bund, and in 1892 the German Chancellor stated that his Government still supported the reform. Of late the official view has been that nothing can be done in face of the attitude of Great Britain. "As things stand," writes Professor Perels in the last edition of his learned work on sea law,[1] "we cannot count on the exemption of private property at sea from capture in the near future. The main factor is that the British Government since the Declaration of Paris has maintained an attitude of persistent and determined resistance to all movements for reforming the laws of maritime warfare." Almost identical is the view of the French Dupuis in his recent work on the Law of Maritime War.[2]

[1] *Das Internationale Seerecht der Gegenwart*, von F. Perels. Berlin, 1902.

[2] *Le Droit de la Guerre Maritime d'après les Doctrines Anglaises Contemporaines.* Paris, 1899.

Italy, of course, is strongly for the reform, which indeed she has provided for in a treaty with the United States, and Italian jurists since the time of Galiani have been generally favourable. What has been done by the United States as protagonists in the movement may be read in the memorial addressed by their delegates to the President of the first Hague Conference;[1] and the writings of Calvo, one of the ornaments of New Spain, have associated the States of Southern America with the policy of their great sister republic in the North. The reform, one need hardly add, has been strenuously supported by the Manchester and Liverpool Chambers of Commerce and by many other leading Chambers in all parts of the world.[2] Among the resolutions recently passed, the most important undoubtedly are those of the German Maritime Union, which represent the sentiments of all the commercial ports of Germany.[3]

Have any solid objections been advanced in favour of maintaining the *status quo*? Sir Henry Maine[4] and others have shown from the conditions of modern warfare at sea and the extreme complexity of trade relations, now inextricably interwoven by international insurances, that the present rule has become inexpedient, if not already impracticable. A navy may sink defenceless ships or bombard defenceless towns in the present state of international law, but who will suffer? The destruction of property either by sea

[1] See Appendix A.

[2] An important Manchester memorial is cited in Appendix B.

[3] See Appendix C.

[4] See Appendix F.

or land may fall anywhere but upon the intended victim. The international insurance office has demolished the old arguments that used to be put forward a century ago.

Great insurance companies have branches and ramifications in every part of the world. Marine Insurance, Fire Insurance, Life Insurance, are all an international business. One illustration may help to fix this argument in the imagination and memory. It will be within the recollection of those who follow naval strategy that in spite of protests both the British and French Admiralty have frequently in recent years revived in the course of naval manoeuvres the old practice of bombarding defenceless towns on the coast, or at least blackmailing their leading citizens by a threat of bombardment. Thus, according to the Admiralty, the laws of war which forbid a land army to bombard a defenceless town on the coast still authorise the barbarity if it is performed from the sea by a fleet! This was in fact done at Scarbro' during the naval manoeuvres last summer. So little claim have the Admiralty to dictate policy. Here they are insisting upon "a right," as they call it, which is not only obsolete but useless, nonsensical, and certain if attempted to excite the universal disapprobation of civilised opinion. Let us suppose, however, that in a war waged, we will say (in order to avoid the appearance of Jingo prophecy), by England and Germany as allies against the United States, the allied fleet appears before San Francisco and proceeds to drop a few shells into the town in order to extort from the inhabitants a contribution which might be distributed in small tips to the sailors and larger

rewards to the officers. After a few discharges, by which only a few hundred innocent persons (many of them of English and German parentage) are killed and wounded, the fleets pause and await the fruits of victory. Alas, to the dismay of the crews, already gloating over the prospect of a fine distribution of prize money, flames have begun to burst out in various parts of the town. A high wind rapidly spreads the conflagration, and in a couple of days the greater part of the city has been consumed. Less than a century ago British troops burned Washington without doing any direct damage to British interests. How different are the conditions now. An innocent might think the bombardment and destruction of San Francisco a grand achievement. As a matter of fact we know what sort of an achievement it would have been because an earthquake did recently what our imaginary bombardment might have done. All the big fire insurance companies of Great Britain were involved in the San Francisco catastrophe, and lost about seven or eight millions, while German companies lost about three millions. So that the British and German fleet by this brilliant operation would have reduced the resources of the allies by no less than ten millions sterling, and they would also have damaged and incensed many neutral countries such as Austria, Sweden, Switzerland, and Belgium. Several Canadian insurance companies would also have been heavily hit. It were a work of supererogation to enlarge upon this theme. I need not do more than point out that marine insurance has ramifications no less wide and no less baffling to the privateering admiral than fire insurance. If fleets and armies once begin

to destroy private merchandise, private buildings, or private shipping with the idea of crippling an enemy, they are simply firing away in the dark, and are just as likely to injure a neutral, an ally, or even their own fellow-subjects whom they are supposed to be defending, as the enemy whom they are supposed to be attacking.

Is it not time then even for those who cling to ruthless war to recognise that their theory must be modified? Let them make a virtue of necessity, and bow the knee, not to the philanthropist, but to the insurance agent. The gentleman pirate has been driven from the seas by the commercial tout.

The policy of destroying your enemy by destroying his commerce had indeed lost its efficacy long ago. When the Crimean War broke out it was promptly recognised that international opinion would no longer tolerate the theories we had endeavoured to enforce in the war with Napoleon. The Declaration of Paris was a death sentence upon wars against commerce; it has left only the possibility of wars against shipping, and to make such wars impossible is obviously the supreme interest of Great Britain. To suppose with the mischief makers who talk of war with Germany or the United States that these countries, with their river and railway communications, would stand to suffer losses equal or comparable to our own is simply puerile. If we persist in opposing this reform, if our Government, in conjunction with that of the United States, fails to carry it through at the next Hague Conference, every patriotic Briton must earnestly hope that our mercantile marine will rapidly diminish and that of other countries rapidly increase. If the present

sea laws, which give the carrying trade in war time to neutral shipping, are to be maintained, it is desirable that less national capital should be invested in shipping, and that the mercantile marine of other countries should be correspondingly enlarged. Otherwise we could not count on being adequately supplied with the food and raw material upon which our national life and industries depend. At present the overwhelming size of our merchant fleet is a source not of military strength but of military weakness. Strange and paradoxical as it may sound, the proposition is perfectly true that under the Declaration of Paris the smaller our mercantile marine the less will our manufactures and our foreign trade suffer in time of war. A Government which declines to support a change in international law should not think of national indemnity or insurance against war risks; it should endeavour to induce some of our leading shipowners to dispose of a good proportion of their vessels to friendly neutrals.

# CAPTURE OF PRIVATE PROPERTY AT SEA.

*From the* "TIMES," *Oct.* 14, 1905.

SIR,—Now that the Russo-Japanese war is ended,[1] will you allow me to press upon your attention a vital question of international law, which has attracted some notice of late, but necessarily without practical result so long as hostilities continued? Ought belligerents to be allowed, as heretofore, to capture enemy merchant vessels and enemy cargo carried therein? It is quite possible that His Majesty's Government may be constrained to form some resolution upon this question in view of the Hague Conference before Parliament meets again. Hence my anxiety to interest yourself and your readers in a point which involves consequences of supreme importance to the welfare of this country in the event of war.

Let me begin by stating plainly the conclusions which I seek to have adopted. I maintain that conditions have completely changed since the Napoleonic

[1] For the juristic problems raised by this war, see Lawrence's *War and Neutrality in the Far East*, 2nd ed., 1904, and *International Law as interpreted during the Russo-Japanese War*, by F. E. Smith and N. W. Sibley, 1905. Since the war ended the objection to floating mines has been intensified by the damage and loss suffered by many peaceful merchantmen in the Japan Seas.

times, and that, whatever it may have been then, it is now the true interest of Great Britain and also of other nations (though the reasons may be diverse) to exempt private property at sea from capture unless really contraband.

I assume that food and raw materials of peaceful industry are not to be regarded as contraband, except when specifically destined for military purposes. The definition of contraband is an important point which deserves attention in view of recent events, but I do not enter upon it now.[1]

At present international law allows a belligerent, as is well known, to capture and confiscate all the merchant ships of the enemy nation and any enemy goods they may contain. Innocent neutral goods in an enemy ship must be released, but are of necessity liable to damage and depreciation in value; for it takes time to convey the prize to port and obtain adjudication, and the neutral goods will have then to be transhipped or sold in the belligerent port for what they will fetch. In case of perishable goods the loss may be enormous. Enemy goods in a neutral ship, unless contraband, are covered by the neutral flag, so far as those nations are concerned which have adhered to the Declaration of Paris (1856).[2] I say

[1] Much valuable material on this subject will be found in the Report of the Royal Commission on Supply of Food and Raw Material in Time of War. Cd. 2643. 1905. Two reforms are urgently required. 1. An international convention defining contraband and restricting it to really war-like materials: 2. The establishment of Prize Courts with international judges. Cp. Appendices C and G.

[2] Seeing that in the Civil War, and again in the war with Spain, the United States gave effect to the Declaration of Paris, we may

nothing of the penalties for violating a blockade, for it is a minor point. Such is the code, so to speak, of international usage to-day.

Consider what its effects are and must be.

I will suppose Great Britain at war with one or more great Continental Powers, and let it also be supposed that the British fleet has established its naval supremacy and has even blockaded the entire coast line of its enemies, which latter is an uncommonly strong hypothesis. In those conditions the only damage we could do to our imaginary enemies would be the suppression for the time of their carrying trade. Part of their merchant navy would be captured and the rest would be confined to port. The injury would not be deadly. They could live upon their own produce and upon the produce of their neighbours carried by rail. They could dispense with seaborne merchandise, or, if required, could purchase it from neighbours who had imported it into their own country, and, but for blockade, they could import it themselves in neutral vessels. Such is the full measure of the mischief we could do to a Continental enemy by a triumphant exercise of the right of capture at sea supplemented by the establishment of a complete blockade.[1] He would be to a great degree invulner-

safely say with Hall that, although the freedom of enemy's goods in neutral vessels is not yet secured by a unanimous act, or by a usage which is in strictness binding on all nations, yet there is little probability of any civilised country attempting to go back from this principle. Cp. Hall's *International Law*, 5th ed., pp. 691-2.

[1] Thus in the case of Germany it must be remembered that a large part of her oversea trade passes through Dutch and Belgian ports. We might alter the routes, but we could hardly expect seriously to diminish the volume of German imports and exports.

able by the weapon of capture, because he lives on a continent. Now all the Great Powers in the world, except ourselves and far distant Japan, live on continents.

On the other hand, what injury would Great Britain in like case suffer from this weapon?

I will first assume the same conditions—namely, an undisputed maritime supremacy on our part. Even so we should be hit pretty hard. No supremacy could be so absolutely effective that we could be sure of sealing up every hostile port and preventing the furtive exit of swift commerce destroyers from time to time.[1] In course of time they would be hunted down and themselves destroyed. But in the interval, whether of weeks or months, many British merchant ships might be captured and sunk. Our merchant marine is vulnerable in proportion to its size and its ubiquity.[2] In any view the losses from increased insurance premiums, resulting at least partially in a transference of our carrying trade to neutral bottoms, with higher freights and therefore higher prices at

[1] The invention of submarines and mines has probably made close blockades so dangerous as to be almost impracticable.

[2] The following is the tonnage possessed by the principal maritime nations in 1903, the last year for which comparative figures are given in the statistical abstracts of the Board of Trade:

| Country. | Tonnage. |
|---|---|
| United Kingdom | 10,268,604 |
| U.S.A. | 5,198,569 |
| Germany | 2,322,045 |
| Norway | 1,443,904 |
| France | 1,235,341 |
| Italy | 1,044,758 |
| Japan | 989,612 |

home, would produce very serious effects. We live from the sea, and therefore what touches our shipping touches our life.

Hitherto I have assumed conditions the most favourable to this country, our command of the sea undisturbed except by the occasional depredations of a few commerce destroyers. In determining upon a policy no sensible statesman could count upon the certainty of such conditions. Were we confronted in war by two strong naval Powers, a considerable time would probably elapse before all the enemy squadrons were driven from the ocean. Is our merchant navy to be laid up all that time? Nor ought we to exclude the possibility of reverses or of a conflict so evenly sustained that neither side could for an indefinite time assert a decisive naval superiority. In order justly to estimate the bearing on British interests of the existing law of maritime capture, all contingencies must be regarded, at least if they are not extravagantly improbable.

Let me recall some considerations which, though very familiar, have hardly received their due weight in this particular argument. The United Kingdom stands quite in a peculiar position. Half our food is imported;[1] if the sea is closed we are half-starved. We are mainly a manufacturing people, and an enormous proportion of our raw material is imported.[2]

[1] Only about 20 per cent. of the wheat consumed in the United Kingdom is home-grown. See *Report on Food Supply in Time of War*, pp. 6-7. About 40 per cent. of our meat supply is imported, of bacon about 60 per cent., of cheese about 50 per cent., and of butter about 70 per cent.

[2] All our cotton and most of our wool.

If the sea is closed we are largely reduced to idleness. We are immeasurably the greatest carrying nation of the world, and thence derive vast profits, estimated by the Board of Trade at 90 millions sterling a year. If the sea is closed we can no longer carry. All these topics are ceaselessly urged, and properly urged, in support of a powerful Navy. Are they not arguments of equal weight against the law of nations which allows capture of private property at sea? The facts I have mentioned alarm us because they mean that war might restrict our supply of food and raw materials and ruin our carrying trade. Which of them would alarm us if it were agreed that private property at sea should be free of capture? We could then in security import our supplies in time of war as in time of peace. Our merchant ships could traverse the ocean with no risks except those of nature. But so long as the present law prevails we are not only liable to be ruined by naval defeat; we are also liable to be ruined by a doubtful or even a technically successful war.

Imagine this country engaged in a protracted and indecisive naval campaign. Foreign nations would soon cease to load their goods in British ships, because, though the goods could not be confiscated, the ship might be captured, and the owners of cargo would necessarily suffer delay and depreciation and the cost of transhipment. They would employ foreign ships free from war risks. So would our own merchants, for a different reason—namely, that under the Declaration of Paris British merchandise carried in a neutral vessel in a state of war is exempt from capture, while British merchandise carried in a British

vessel is liable to capture by the enemy. Any one may easily conjecture the rates of freight that would be demanded by foreign shipowners if they found themselves suddenly in so commanding a position. And are there enough foreign ships to do the work? If not, our own merchant ships would have to go out and run the gauntlet of the enemy cruisers; but at what premiums for insurance? Who can compute the effect of such a situation on prices of the necessaries of life and industry? or the difficulty of recovering on the conclusion of peace the carrying trade which war might so easily cripple or destroy? The boldest Minister might well flinch from continuing a war with short supplies and famine prices at home. Well, but all this would be the direct result of the rule allowing capture of private property at sea, and could not occur if that rule were altered. For I believe an effective blockade of the British Isles is impracticable.

When these things are considered, and I do not think I have overstated the danger, let me ask what advantages that can be derived from the law of capture are at all comparable to the mischiefs it might entail upon us. It is said, in the old times, the pressure of the British fleets upon commerce was one of the chief instruments by which our forefathers often secured ultimate victory. That is so. Louis XV. was compelled to make peace in 1763 largely by the ruin of French trade. Other examples occur in the record of the Napoleonic wars.[1] All this is true, but why was the strain so severe in those days? It was because

[1] On the other hand, the losses of English merchants in the wars of the eighteenth century were enormous.

the want created by closing the sea could not then be compensated by land-borne supplies. In those days the doctrine that a neutral flag covers enemy goods had not been established, and land transport from any great distance, even from shorter distances, was impracticable on the necessary scale. Therefore to check sea-borne trade was to check a very great proportion of all trade. Only canals and navigable rivers remained, and they were none too frequent.

The other day you printed an extract from *The Times* of September 6, 1805, which illustrates this point. Lord Nelson was just about to sail to take command of the British fleet off Cadiz, and in a few weeks to fight the battle of Trafalgar. The Franco-Spanish fleet was shut up in Cadiz, and *The Times* of that date, after asking how the enemy crews, numbering 20,000 men, and the inhabitants of Cadiz were to be fed, proceeds as follows:

"Abundant as we are glad to be informed the harvest has been throughout Spain, that town and district, even at periods of the greatest plenty, is obliged to depend for the greater part of its supplies on the coasting trade. That resource will be cut off from them [by the British fleet], and no other means are left to them of procuring supplies but such as are attended with an expense which will place the necessaries of life above the reach of the greater part of the inhabitants; all the consequences of famine may be expected to be felt there. It is, indeed, the opinion of many well-informed persons that the combined squadrons [of France and Spain] cannot find provisions at Cadiz, and that they must come out and seek subsistence elsewhere, or be reduced to the

alternative of starving in that port themselves or producing a famine among the population of Cadiz."

Exactly; and that is what came to pass. But if to-day any port of Spain required supplies, an abundance could be brought in neutral vessels or by railway. It comes to this. Since science has provided effective means of land carriage, the weapon of capture at sea has largely lost its edge against any Continental nation. I do not mean that it is the interest of Continental Powers to uphold this law. Far from that. They would profit in many ways by its abolition. They would be able to trade freely in their own ships in every sea, even when at war, untouched by the powerful fleets of Great Britain. Half or more than half their inducements to maintain costly navies of their own would thus disappear. I mean that British interests also and equally demand an alteration of the law. We have now more to lose by the law as it stands, and less to gain, than in former days. And the balance is immeasurably in favour of change.

It may be asked, What prospect is there of altering the law in this respect, even if we desired it? An answer may be found in the history of this question, upon which, instructive though it be, a few words must suffice. During the last 50 years or more the United States have persistently advocated this change, even to the point of refusing to abandon the right of privateering in 1856 unless all private property (other than contraband) should be declared free from maritime capture. Germany, Austria, Italy, Russia have all within the last half-century either adopted in their own practice, or offered to adopt,

the American view; and Continental jurists have almost without exception denounced the existing law. Indeed, two nations, Great Britain and France, have alone stood in the way, and, but for their opposition, the American view would have prevailed many years ago. Perhaps Great Britain and France opposed because they were the only great naval Powers at the time. Perhaps other nations which have since become, or resolved to become, great naval Powers may now oppose what they once supported. That remains to be seen. It is enough to say that the chances of reform in this direction seem very hopeful, if only the British Government is willing.

Last year President Roosevelt declared in favour of a new International Conference at the Hague, and notified that, among other matters for deliberation, the United States intended again to press this very subject on the attention of the Powers. Unquestionably the American President, with the immense authority he now wields, will exert every effort to attain his point. I trust that His Majesty's Government will avail themselves of this unique opportunity. I urge it not upon any ground of sentiment or of humanity (indeed, no operation of war inflicts less suffering than the capture of unarmed vessels at sea) but upon the ground that on the balance of argument, coolly weighed, the interests of Great Britain will gain much from a change long and eagerly desired by the great majority of other Powers.

Your obedient servant,

R. T. Reid.

# APPENDIX A.

## SUMMARY OF PROPOSALS FOR THE REFORM OF MARITIME WARFARE, 1785-1899.

(*Extract from a Memorial Addressed by the Representatives*[1] *of the United States to the President of the Hague Conference, June 20th,* 1899.)

EXCELLENCY,

In accordance with instructions from their Government, the Delegation of the United States desire to present to the Peace Conference, through Your Excellency as its President, a proposal regarding the immunity from seizure on the high seas, in time of war, of all private property except contraband.

It is proper to remind Your Excellency, as well as the Conference, that in presenting this subject we are acting, not only in obedience to instructions from the present Government of the United States, but also in conformity with a policy urged by our country upon the various Powers at all suitable times for more than a century.

In the Treaty made between the United States and Prussia in 1785 occurs the following clause:

> "Tous les vaisseaux marchands et commerçants, employées à l'échange des productions de différents endroits, et, par conséquent, destinés à faciliter et à répandre les necessités, les commodités et les douceurs de la vie, passeront librement

[1] The memorial was signed by Andrew D. White, Seth Low, Stanford Newell, A. T. Mahan, William Crozier, and Frederick W. Holls.

et sans être molestés. . . . Et les deux Puissances contractantes s'engagent à n'accorder aucunes commissions à des vaisseaux assurés en course, qui les autorisent à prendre ou à détruire ces sortes de vaisseaux marchands ou à interrompre le commerce." (Art. 23.)

In 1823 Mr. Monroe, President of the United States, after discussing the rights and duties of neutrals, submitted the following proposition:

"Aucune des parties contractantes n'autorisera des vaisseaux de guerre à capturer ou à détruire les dits navires (de commerce et de transport) ni n'accordera ou ne publiera aucune commission à aucun vaisseau de particuliers armé en course pour lui donner le droit de saisir ou détruire les navires de transport ou d'interrompre leur commerce."

In 1854, Mr. Pierce, then President, in a message to the Congress of the United States, again made a similar proposal.

In 1856, at the Conference of Paris, in response to the proposal by the greater European Powers to abolish privateering, the Government of the United States answered, expressing its willingness to do so, provided that all property of private individuals not contraband of war, on sea as already on land, should be exempted from seizure.

In 1858, under the administration of Mr. Buchanan, then President, a Treaty made between the United States and Bolivia contemplated a later agreement to relinquish the right of capturing private property upon the high seas.

In 1871, in her Treaty with Italy, the United States again showed adhesion to the same policy. Article 12 runs as follows:

"The High Contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."

It may be here mentioned that various Powers represented at this Conference have at times indicated to the United States a

willingness, under certain conditions, to enter into arrangements for the exemption of private property from seizure on the high seas.

It ought also to be here mentioned that the doctrine of the Treaty of 1871 between Italy and the United States had previously been asserted in the Code of the Italian Merchant Navy as follows :

> "La capture et la prise des navires marchands d'un État ennemi par les navires du guerre seront abolies par voie de réciprocité à l'égard des États qui adoptent la même mesure envers la marine merchande italienne. La réciprocité devra résulter de lois locales, de conventions diplomatiques, ou de déclarations faites par l'ennemi avant le commencement de la guerre." (Article 211.)

And in the correspondence with Mr. Middleton, the Representative of the United States at the Russian Court, Count Nesselrode, so eminent in the service of Russia, said that the Emperor sympathised with the opinions and wishes of the United States, and that "as soon as the Powers whose consent he considers as indispensable shall have shown the same disposition, he will not be wanting in authorising his ministers to discuss the different articles of an act which will be a crown of glory to modern diplomacy."

In this rapid survey of the course which the United States have pursued during more than a century, Your Excellency will note abundant illustrations of the fact above stated, namely, that the instructions under which we now act do not result from the adoption of any new policy by our Government, or from any sudden impulse of our people, but that they are given in continuance of a policy adopted by the United States in the first days of its existence and earnestly urged ever since.

Your Excellency will also remember that this policy has been looked upon as worthy of discussion in connection with better provisions for international peace, not only by eminent statesmen and diplomatists in the active service of various great nations, but that it has also the approval of such eminent recent authorities in international law as Bluntschli, Pierantoni, De Martens, Bernard, Massé, De Laveleye, Nys, Calvo, Maine, Hall, Woolsey, Field, Amos, and many others.

We may also recall to your attention that the Institute of International Law has twice pronounced in its favour.

The proposition which we are instructed to present may be formulated as follows:

> The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of any of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers.

## APPENDIX B.

### MANCHESTER MEMORIAL, 1860.

As it is from our merchant service that our navy must ultimately draw its reserve of sailors, it is most important, in a national point of view, that the mercantile marine should not be placed, as at present, under circumstances calculated unfairly to affect its prosperity and extension.

And we can conceive nothing more likely to alienate the Colonies from the mother country, than that their ships and floating property shall be endangered by a war originating in some European question, about which they may be wholly indifferent.

The arguments in opposition to the change are, as we understand them, as follows:

First. That war must be made calamitous, in order to expedite its termination, and indispose nations to resort to it on frivolous pretexts.

This argument is open to a simple *reductio ad absurdum*, for if logically carried out, it would justify the most atrocious practices of savage ages; and in contradiction of it, we have the most happily expressed opinion of Lord Palmerston, who said in 1856:

> "If we look at the example of former periods, we shall not find that any powerful country was ever vanquished by

losses sustained by individuals; it is the conflict of armies by land or of fleets by sea that decide the great contests of nations, and it is perhaps to be desired that these conflicts should be confined to the bodies acting under the orders and directions of the respective States."

Moreover, a heavy tax levied to meet the current expenses of war, is a far more just means towards checking the warlike passions of mankind, than the sacrifice of particular classes, among whom it is proposed to spread ruin, simply to ensure their strenuous advocacy of peace.

Secondly. That the prospect of prize money lessens the cost of manning the navy.

It is, however, most short-sighted and narrow economy, to attempt to keep down the direct expenses of the navy by a system which holds the commerce of this country in uncertainty. Moreover, the sailors get in fact so small a share of prize money, that we do not believe that the distant chance of it has any appreciable effect in inducing them to enter the service.

Thirdly. That such a change in International Law will not be respected longer than may suit the convenience of either belligerent.

Past history, however, shows that European nations have, with rare exceptions, respected the principles of International Law, when well defined, and established by their unanimous concurrence. If private property at sea were declared inviolate, its seizure would morally be an act of piracy. So far are nations in the present day from being inclined to push war to extremes, not sanctioned by international usages, that they have on several occasions shrunk from availing themselves of practices still nominally permitted; as witness the release, by the Emperor of the French, of the Austrian merchant ships seized in the late war, in order as he expressed it, to "attenuate the evils of war." And, moreover, the principle, if once agreed to, could not be violated without risking a collision with those neutral nations whose subjects might have entrusted themselves and their property under the flag of a belligerent, in full faith of security from either capture or detention.

All the arguments so far brought forward in defence of the exceptional state of morality on the ocean, seem to us utterly insufficient. The present practice appears to have its origin in the piratical character of the early navigators; and although

during times of peace the inviolability of property at sea has long been acknowledged by all civilized countries war is no sooner declared than the order is issued to seize, burn and destroy the maritime property of the enemy, in a spirit worthy only of the most barbarous times.[1]

## APPENDIX C.

### HAMBURG AND BREMEN.

Both the Hamburg and Bremen Chambers passed resolutions after the Declaration of Paris calling for its extension to all non-contraband Private Property at sea in war-time, and the Deutscher Nautischer Verein, with which both Chambers of Commerce are intimately linked, passed resolutions in 1871, 1890, 1900 and 1905, the most specific being those of 1905, when the Secretary of the Hamburg Chamber of Commerce, Dr. Gutschow, acted as Reporter for the Committee. The terms of the resolutions are as follows:

The Maritime Unions resolve, with one dissentient, on a petition to the Imperial German Chancellor, to exercise all the influence he can bring to bear in order that the International Laws applying to the rights of belligerents in naval warfare may be developed in a spirit of humanity, and with due regard to the circumstances of maritime intercourse; and especially that:

(*a*) the seizure and destruction of private property (excepting contraband of war) belonging to subjects of the belligerent nations, be declared inadmissible:

(*b*) the right of searching merchant vessels be exercised only in the case of ships proceeding to an enemy's port:

(*c*) the term contraband of war be defined.[2]

The last two clauses of the resolution are advocated in Herr Fitger's recent book, *Die Rückwirkung des Ostasiatischen Krieges auf das Völkerrecht.*

[1] From a Memorial drawn up by the Manchester Chamber of Commerce in 1860.

[2] The above information appeared in the *Tribune*, July 25, 1906, in an article by a Hamburg correspondent.

# APPENDIX D.

## ARGUMENT OF THE ABBÉ DE MABLY.[1]

### (1)

"WHY do two nations in declaring war forbid all reciprocity of commerce? This usage is a relic of our ancient barbarism. Ought we to indulge our hatred towards our enemies when we become the victims of our own resentment? Perhaps a system of politics at once timid and resourceless has persuaded us that it is dangerous to receive an enemy's subjects in time of war. I agree that it would be imprudent to accord them the same liberty that they enjoy in time of peace; but what inconvenience would there be in two nations at war allowing their merchants facilities to frequent one or two free ports? It would be easy to establish in such places a system of police that would reassure the most suspicious. . . . In prohibiting commerce the object is sensible enough—that of injuring your enemy; but it is a mistake if in so doing you do yourself as much harm as you seek to inflict on him. In the existing state of Europe every country, thanks to this policy of prohibiting commerce in time of war, finds itself suddenly deprived of some branch of its trade and suffers from the loss. Its merchants are surfeited with a mass of undisposable commodities, which deteriorate in the warehouses; the revenues dwindle; manufactures languish; the workpeople become paupers, and a burden upon the State; agriculture suffers from the want of a demand for its products; foreign commodities which custom has made necessary or indispensable are augmented in price and are smuggled into the country in spite of all precautions; so that the state loses its customs and its revenues diminish, or are collected with more difficulty, at the very time when expenditure on an extraordinary scale is unavoidable."—See chap. xi. § 12 of *Le droit public de l'Europe fondé sur les traités* by the Abbé de Mably, from the last edition corrected by the author. Geneva, 1776.

[1] The first publicist and jurist of repute to plead for the immunity of private property from capture at sea.

(2)

"According to a statement prepared by order of the English Parliament, England lost during the war of 1688 4,200 merchant vessels, valued at 30 million sterling, and France was far from having enough commerce to have suffered an equal loss. In the war of the Spanish succession and in that of 1741 many families were reduced to pauperism. How many companies of merchants have laid their grievances before Parliament? Has not the public complained a hundred times of the neglect of government to protect British commerce against French and Spanish privateers? The war of 1756 witnessed the same complaints and the same murmurs, while the nation, always successful in its enterprises, was mistress of every sea. The loss of merchant vessels was reported daily on the London Exchange; and, if one were to sum up from the public journals the number of prizes taken by French and English cruisers (armateurs) I have no doubt the first would be found the most numerous. The rates of insurance were no lower in England than in France. I notice elsewhere that the English have gained less than they expected from their prizes; for many of the people they robbed were their own citizens."—From the Abbé de Mably. *Ibid.*

## APPENDIX E.

### FRANKLIN'S TREATY WITH FREDERIC THE GREAT.

"During the negotiations for peace [in 1784] with the British Commissioner, David Hartley, our Commissioners had proposed, on the suggestion of Dr. Franklin, to insert an article, exempting from capture by the public or private armed ships of either belligerent, when at war, all merchant vessels and their cargoes, employed merely in carrying on the commerce between nations. It was refused by England, and unwisely, in my opinion. For, in the case of a war with us, their superior commerce places infinitely more at hazard on the ocean than ours; and, as hawks abound in proportion to game, so our privateers would swarm in proportion to the wealth exposed to their prize, while theirs

would be few for want of subjects of capture. We inserted this article in our form, with a provision against the molestation of fishermen, husbandmen, citizens unarmed and following their occupations in unfortified places, for the humane treatment of prisoners of war, the abolition of contraband of war, which exposes merchant vessels to such vexatious and ruinous detentions and abuses; and for the principle of free bottoms, free goods.

In a conference with the Count de Vergennes, it was thought better to leave to legislative regulation on both sides such modifications of our commercial intercourse as would voluntarily flow from amicable dispositions. Without urging, we sounded the ministers of the several European nations at the court of Versailles on their dispositions towards mutual commerce and the expediency of encouraging it by the protection of a treaty. Old Frederic, of Prussia, met us cordially and without hesitation, and appointing the Baron de Thulemeyer, his minister at the Hague, to negotiate with us, we communicated to him our *Projet*, which, with little alteration by the King, was soon concluded. Denmark and Tuscany entered also into negotiations with us."—From *Jefferson's Memoirs*.

Franklin's clause (article xxiii.) of the Treaty with Prussia ran as follows:

"If war should arise between the two contracting parties, the merchants of either country, then residing in the other, shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance; and all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others, whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses and goods be burnt, or otherwise destroyed, nor their fields wasted by the armed force of the enemy into whose power, by the events of war, they may happen to fall; but, if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price. And all merchants and trading vessels employed in exchanging the products of different places, and thereby rendering

the necessaries, conveniences, and comforts of human life more easy to be obtained, and more general, shall be allowed to pass free and unmolested; and neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels, or interrupt such commerce."

## APPENDIX F.

### AZUNI'S PROPOSALS.[1]

"THE period the most favourable and the fittest to procure this happiness [a reform of the laws of naval warfare] will unquestionably be during the general pacification of Europe after the ruinous war which now desolates it. The surest means of attaining our object would be by the treaties of peace that will undoubtedly be made by the belligerent powers. What benefits would result to commercial nations if in all future treaties they were to adopt the following articles as the foundation of a new conventional code:

1. In future no merchant vessel shall be stopped nor seized unless laden with articles really contraband.
2. The rights of the neutral flag shall be considered inviolable.
3. The sea ports, even those of the belligerent nations, shall enjoy the privileges of neutrality as to those articles of commerce which have no immediate relation to war.
4. The denomination of contraband shall extend only to articles that are of immediate use in war.

"This idea may, perhaps, be considered as one of those political dreams formerly indulged in as to a perpetual and universal peace. No person, however, will deny the possibility of its being realised. It may be objected that England has continued for two centuries to oppose other nations who advocate more humane principles of maritime law; that, confiding in the superiority of her naval power, she has constantly affected to give law to others on this point, and will not fail to defeat such a project. In

[1] Azuni (an Italian by birth) was the leading French authority on maritime law at the time of the Napoleonic wars.

answer, I shall adduce events that have happened in the present age sufficient to obviate these objections and to give weight to the possibility of this system."—From Azuni's *Droit Maritime de l'Europe*, part ii. chap. iii. § 2.

## APPENDIX F.

### SOME ENGLISH OPINIONS.

#### Brougham (1806).

"In the enlightened policy of modern times, war is not the concern of individuals, but of governments; it is only a more coarse sort of diplomacy, in which the interests of contending nations are entrusted to public functionaries and accredited agents, who measure their strength and dexterity in liberal competition, and carry on their operations according to laws and conventions as perfectly understood as those which regulate the ceremonial of courts. It is no longer thought lawful to annoy an enemy indiscriminately by every means in our power, nor is it enough to justify an act of violence or cruelty that it has a manifest tendency to weaken or intimidate the nation with which we are at war. We have ceased to poison arms or provisions, to refuse quarter, to massacre women and children, or to sack and burn defenceless towns and villages. Those who take no part in actual hostilities in short are now understood to be exempted from its terrors, and are not legal objects of attack, except in cases where the actual combatants are forced to interfere with them by the unavoidable necessities of their own situation. The private property of pacific and industrious individuals seems to be protected by the spirit of these regulations; and, except in the single case of maritime capture, it is spared accordingly by the general usage of all modern nations. No army now plunders unarmed individuals ashore, except for the purpose of providing for its own subsistence; and the laws of war are thought to be violated by the seizure of private property for the sake of gain, even within the limits of the hostile territory.

It is not easy, at first sight, to discover why this humane and

enlightened policy should still be excluded from the scenes of maritime hostility; or why the plunder of industrious merchants, which is thought disgraceful on land, should still be accounted honourable at sea."—From an article in the *Edinburgh Review*, April, 1806.

PALMERSTON (1856).

"It has been a subject of great satisfaction to us to reflect, that at the commencement of the Russian conflict the Government of England, in concert with that of France, made changes and relaxations in the doctrine of war, which, without in any degree impairing the power of the belligerents against their opponents, maintained the course of hostilities, yet tended to mitigate the pressure which hostilities inevitably produce upon the commercial transactions of countries that are at war. I cannot help hoping that those relaxations of former doctrines which were established in the beginning of the war, practised during its continuance, and which have been since ratified by formal engagements, may, perhaps, be still further extended; and in the course of time those principles of war which are applied to hostilities by land may be extended, without exception, to hostilities by sea; so that private property shall no longer be the object of aggression on either side. If we look at the example of former periods, we shall not find that any powerful country was ever vanquished through the losses of individuals. It is the conflict of armies by land, and of fleets by sea, that decide the great contests of nations."—From Lord Palmerston's Address to the Liverpool Chamber of Commerce, Nov. 8, 1856.

COBDEN (1862).

"There are two points of resemblance between the old protective system and that code of maritime law which we are assembled to consider. Both had their origin in barbarous and ignorant ages, and both are so unsuited to the present times, that, if they are once touched in any part, they will crumble to pieces under the hands of the reformer. Upon that account, we ought to be thankful that, in the negotiation of the Treaty of Paris, in 1856, the Plenipotentiaries—I do not know why, for they

were not urged at the time to deal with the subject—ventured upon an alteration of the system of international maritime law. You are aware that, at the close of the Crimean war, the Plenipotentiaries, meeting in Congress at Paris, made a most important change in maritime law, as affecting belligerents and neutrals. They decided, that in future, neutral property at sea, during a time of war, should be respected when in an enemy's ship, and that enemy's property should be respected when under a neutral flag; and they also decided that privateering should in future be abolished. These propositions, after being accepted by almost every country in Europe, with the exception, I believe, of Spain, were sent to America, with a request for the adhesion of the American Government. That Government gave in their adhesion to that part of the Declaration which affirmed the rights of neutrals, claiming to have been the first to proclaim those rights; but they also stated, that they preferred to carry out the resolution, which exempted private property from capture by privateers at sea, a little further; and to declare that such property should be exempted from seizure, whether by privateers or by armed Government ships. Now, if this counter proposal had never been made, I contend that, after the change had been introduced affirming the rights and privileges of neutrals, it would have been the interest of England to follow out the principle to the extent proposed by America."—From Cobden's speech to the Manchester Chamber of Commerce, October 25, 1862.

MILL (1867).

"Those who approve of the Declaration of Paris mostly think that we ought to go still farther; that private property at sea (except contraband of war) should be exempt from seizure in all cases, not only in the ships of neutrals, but in those of the belligerent nations. This doctrine was maintained with ability and earnestness in this House during the last Session of Parliament, and it will probably be brought forward again; for there is great force in the arguments on which it rests. Suppose that we are at war with any power which is a party to the Declaration of Paris; if our cargoes would be safe in neutral bottoms, then if the war was of any duration our whole import and export

trade would pass to the neutral flag, most of our merchant shipping would be thrown out of employment and would be sold to neutral countries, as happened to so much of the shipping of the United States from the pressure of two or three—it might be almost said of a single cruiser. Our sailors would naturally follow our ships, and it is by no means certain we should regain them even after the war was over. Where would then be your naval reserve? Where your means of recruiting the Royal Navy? A protracted war on such terms must mean national disaster. It will thus become an actual necessity for us to take the second step, and obtain the exemption of all private property at sea from the contingencies of war."—Speech of John Stuart Mill, August 5, 1867.

SIR HENRY MAINE (1888).

"The fact that in any future maritime war it will probably be found that these branches of law have changed their character, not through any alteration of opinion, but through industrial development, may suggest a suspicion that the new maritime law created by the Declaration of Paris, though now hardly more than thirty years old, may yet shortly prove obsolete. . . . The question is whether it is worth while amending the Declaration of Paris, and making it of universal application by accepting the further reforms proposed by the United States; that is, by exempting all private property from capture, and by abolishing privateering.

"Let us first ask ourselves what is supposed to be the object in war of subjecting the property of an enemy to capture, either in his own ships or in neutral bottoms? It does not directly benefit the country carrying out the law, because under modern practice a vessel properly captured belongs, not to the State, but to the captors. The assumption is that it distresses the enemy, that it enfeebles his trade and raises greatly the price of many luxuries and commodities, and, more than all, that it seriously diminishes his capital. It is here to be observed that the view of maritime law taken, even by international lawyers, does not quite answer the truth. A metaphor used in the last century was that the operations of maritime war resembled a flight of carrier pigeons pursued by a flight of hawks. But he who would repeat this figure would have to forget the enormous growth of the practice

of maritime insurance. It may happen as to war risks as with insurance against perils of the sea, that a capture of a man's vessel, if prudently managed, may enrich rather than impoverish him. No doubt enhanced rates of insurance do impoverish a nation, and do diminish its capital. But the loss is widely diffused, it falls on the well-to-do class, and a war must be very protracted in which increase of maritime insurance would be sensibly felt by the mass of the population.

"Another general position may be noticed. In a war in which aggression is kept on the old footing by the powers of armament which privateering gives, the Power which has most property at sea is most injured. The old law took for granted the equality not only of naval strength among states, but in volume of trade and of property risked. To the amount of risk, the amount of loss will always correspond. The question, therefore, arises: what interest have we, what interest has Great Britain, in refusing to grant a general immunity from capture to all private property at sea? In the first place, so far as trade is conducted by maritime conveyance, this country has incomparably the largest share in it. This is in great part a consequence of a revolution in shipbuilding. So long as ships were built of wood, the maritime Powers were those which commanded most timber. The Baltic States, Russia, and the United States seemed likely to have in turn a monopoly of transport. The Dutch swept the world for timber adapted to maritime purposes. But now that ships of all classes are made of iron, the monopoly of construction and possession has passed to Great Britain. We are both the constructors and the carriers of the world, and we suffer more than any other community from all dangers, interruptions, and annoyances which beset maritime carriage.

"But far the most serious consideration affecting the matter before us—that is, the conformity of the Declaration of Paris to our permanent interests—is the relation of maritime law, which it sets up, to the supply of food. The statesmen of the last century, and of the first part of this, unhesitatingly assumed that it was the interest of this country to raise the largest part of the food of its population from British soil. They were used to wars, and the great French war seemed to them to establish that a country not fed by the produce of its own soil might be reduced to the

greatest straits. In fact, the price of corn during the great French war, and even for some years following it, was absolutely prodigious. This is the secret of their protectionism, and not any particular economical theory. They looked on the evils of importing food from abroad as a clear deduction from experience. Since that period the infrequency of wars has kept out of sight the unexampled nature of our position with regard to food. So far as the articles most necessary to life are concerned, we are mainly fed from other countries removed from us by vast distances—from North America and from India; that is to say, a great part of the national food before reaching us is only accessible to us through maritime carriage, very long and capable of very easy interruption."

After referring to the statistics of food imports into Great Britain in 1887, Maine concludes:

"These, of course, are economical reasons, but I also look on the subject from the point of view of international law. Unless wars must be altogether discarded as certain never again to recur, our situation is one of unexampled danger. Some part of the supplies which are matter of life and death to us may be brought to us as neutral cargo with less difficulty than before the Declaration of Paris was issued, but a nation still permitted to employ privateers can interrupt and endanger our supplies at a great number of points, and so can any nation with a maritime force of which any material portion can be detached for predatory cruising. It seems, then, that the proposal of the American Government to give up privateers on condition of exempting all private property from capture, might well be made by some very strong friend of Great Britain. If universally adopted it would save our food, and it would save the commodities which are the price of our food from their most formidable enemies, and would disarm the most formidable class of these enemies."—From Maine's *International Law*, 2nd ed. pp. 116-122.

# APPENDIX G.

## PRIZE MONEY AND PRIZE COURTS.

*(Extract from Lawrence's "Principles of International Law," chap. v.).*

As between belligerents superior force is its own justification. If enemy's property is captured at sea under circumstances that render it liable to hostile seizure and detention by the laws of war, the rights of the original owners are destroyed, though they may be revived by the *Jus Postliminii* in cases of recapture. But sometimes it is doubtful whether certain property really belongs to an enemy owner, or whether the capture was effected in a place where warlike operations may be carried on; and it is always necessary to determine the exact extent of the proprietary rights accruing to the individual captors. It follows, therefore, that the intervention of a Court is highly desirable, even in cases where belligerent property, or what is believed to be such, is the only subject-matter concerned. But desirability becomes necessity when neutral rights and neutral claims are involved. Force cannot control the relations of states at war with the subjects of powers which take no part in the contest. They may be condemned to lose their property under certain circumstances, but the mere fact that a belligerent has succeeded in obtaining and keeping possession of it does not give him a right to it. The question whether he has such a right or not is a question of law to be settled by judicial proceedings. Accordingly, all civilised belligerents establish Prize Courts for the protection of neutral subjects and the proper adjustment of the claims of captors. When the servants of a state seize enemy's property at sea, in strictness of law they seize it for their country, and not for themselves; but as in the similar case of booty on land, the law of every civilised nation gives the whole or the portion of the captured movables to the captors according to some scale of reward fixed by public authority. In the United States, Congress has power to make rules concerning captures at sea, and it exercised this power in 1864 by passing an act which gave the whole of the value to the captors when the vessel or vessels making the capture were of equal or inferior

force to the prize; but if their force were superior, they were to receive a half only, the rest going to the Treasury. In the same year the British Parliament legislated on the subject in the Naval Prize Act, which expressly declares that captors "shall continue to take only the interest (if any) in the proceeds of prizes as may be from time to time granted to them by the Crown." But it is and has been the invariable rule of the Crown in modern times to surrender the entire proceeds to the officers and men engaged in the capture. The general practice of Prize Courts is to order a sale of the vessel or goods on condemnation, and the sum thus realised is divided among the captors.

Prize Courts are municipal tribunals set up by belligerent States in their own territory, in territory under their military occupation, or in territory belonging to an ally in the war. In the last case the permission of the ally must be obtained beforehand. But a neutral cannot allow the establishment of a belligerent Prize Court in its territory without a grave breach of the duties prescribed by neutrality. . . .

Though Prize Courts are set up by the authority of a belligerent government, and their judges are appointed and paid by it, they exist for the purpose of administering International Law. In America court after court has decided that International Law is part and parcel of the law of the land: and it is held that every member of the family of nations must submit to the rules of the society of which it forms a part. In England this view has not been so clearly expressed or so widely adopted. But it is nevertheless the dominant opinion, and on the continent of Europe it would meet with general acceptance, that it would hardly be stated in the terms we have used. All nations would, however, agree in holding that their Prize Courts were bound to apply the rules of the law of nations to the cases which came before them for settlement; and in the vast majority of cases practice on this point coincides with theory. While human nature remains what it is, the most upright and able of judges will find it impossible to divest themselves altogether of influences due to national predilections or professional training. But it is possible to reduce these disturbing elements to a minimum, and the great lights of international jurisprudence who have

adorned the judicial bench have been as conspicuous for impartiality as for learning. There is, however, one case where the most upright of judges may be compelled to give a decision which he knows to be contrary to the received principles and rules of the international code. It occurs when the government of his own country, through its appropriate department, issues for the guidance of its cruisers instructions which order them to make captures of enemy of neutral vessels, under circumstances deemed innocent by the law of nations as generally understood and acted upon. Such were the Berlin and Milan Decrees of the first Napoleon and the retaliatory British Orders in Council. The naval officers of each country were, of course, obliged to obey the orders issued to them by their superiors, and the courts were equally bound to notice and administer the rules laid down by legislative authority.[1] If they had refused they would have been in a state of contumacy, and their judges would have been quickly dismissed.

## APPENDIX H.

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[1] If this be so the case for replacing international for national judges in prize courts is surely overwhelming.

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